1-1004-15233-10

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Petition for Review of the Minnesota Department of Commerce Policy Pronouncement and Guidance Document Regarding Insurance/Credit Scoring Filings

ORDER

By a Petition filed on December 12, 2002, the Insurance Federation of Minnesota, the National Association of Independent Insurers, the Alliance of American Insurers, and the American Insurance Association, ("Petitioners") seek an order directing the Department of Commerce to cease enforcement of an unadopted rule. The Department of Commerce ("the Department") filed a written response on January 6, 2003. That date was the final submission.

John A. Knapp, Esq. and Jeffrey D. Bland, Esq. of the firm of Winthrop and Weinstine, P.A., 3200 Minnesota World Trade Center, 30 East 7th Street, St. Paul, MN 55101, represented the Petitioners. Stephen K. Warch, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101-2130, represented the Department of Commerce.

Based upon all of the filings by the parties and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. That the Department of Commerce shall cease enforcement of the November 7, 2002 document entitled "Information for Insurance Companies Regarding Filings under Laws of Minesota Chapter 357 (Minn. Stat. § 72A.20, subd. 36)."

2. The Department shall publish this decision in the State Register.

3. The Petitioners shall remit one-half of the cost of this proceeding to the Department of Commerce.

Dated this 15th day of January 2003.

S/ George A. Beck
GEORGE A. BECK
Administrative Law Judge

NOTICE

This decision is the final administrative decision under Minn. Stat. § 14.381. It can be appealed to the Minnesota Court of Appeals under Minn. Stat. § § 14.44 and 14.45.

MEMORANDUM

The Petitioners seek an Order determining that the Department is enforcing two recently issued documents as a duly adopted rule. If the record demonstrates this to be the case, the Administrative Law Judge must direct the Department to cease enforcement of the unadopted rule under a recently adopted provision of the Minnesota Administrative Procedure Act.[1]

The Petition challenges two documents issued by the Department to all insurers writing private passenger auto or homeowners insurance in Minnesota. One document provides guidance to insurance companies as to what information they should file to fulfill their legislatively prescribed obligations under a new statute ("the guidelines"). The new law regulates the use of credit scoring or insurance scoring in the underwriting of insurance coverage in Minnesota. The new statute precludes insurers from rejecting, canceling or not renewing an automobile or homeowners policy in whole or in part on the basis of credit information, including a credit score, without consideration and inclusion of any other applicable underwriting factor.[2] Under the new law a credit score may not be the sole criteria for rejecting, canceling or non-renewing a policy. The Petitioners also challenge a letter sent with the guidelines that asks for general information to allow the Department to examine compliance with the statute ("the letter").

The new statute specifically requires that the following information be provided to the Commissioner:

> (g) Insurers that employ a credit scoring or insurance scoring system in underwriting of coverage described in paragraph (a) must have on file with the commissioner:
>
> (1) the insurer's credit scoring or insurance scoring methodology; and

(2) information that supports the insurer's use of a credit score or insurance score as an underwriting criterion.[3]

After the new legislation was passed insurers who utilize credit scoring in underwriting began contacting the Department asking what they needed to file in order to comply with subd. 36(g). The Department issued the November 7, 2002 guidelines to insurers in response to those requests. The Department notes that the house author of the legislation, Rep. Gregory Davids, stated on the House floor that the insurers had to file a complete methodology concerning their underwriting program, not just a summary description of it. He also stated that insurers were to verify that the credit scoring system used by the insurer does what the insurer claims it does.

The Petitioners argue that the November 7, 2002 guidelines require the submission of detailed information well beyond any statutory filing requirements.[4] They suggest that rather than simply requiring a methodology and supporting information, the pronouncement requires an entire analysis, including the formula, an explanation of the formula, a description of the characteristics, the underlying data and a sample calculation. With respect to supportive information, the Petitioners point out that they are required to provide "corroborating evidence that verifies the effectiveness of the credit scoring system" as well as extensive information regarding the insurer's data that demonstrates a correlation between credit/insurance scores and losses, an explanation of their premium and loss data used, an explanation of the length of time for which the score is considered valid, actual company premium and loss experience using credit/insurance scores, and an explanation of how credit/insurance scoring will be used relative to other underwriting.

Generally, when an agency's interpretation of a statute in a written directive coincides with the plain meaning of that statute, the agency is not deemed to have engaged in rulemaking.[5] In other words, if an agency statement is consistent with the plain meaning of the statute interpreted, the agency action is authorized by the statute itself and the fact that no rule was adopted did not render the statement invalid.[6] However, when an agency's announced policy is inconsistent with the statute or a rule, the courts have often invalidated that policy.[7] And where the policy makes new law without the public input required by the APA, the policy will be invalidated.[8] So the question is whether or not the guidelines issued by the Department are a permissible interpretation of the statute, consistent with its plain meaning, or whether it constitutes the improper adoption of a new rule.

The Department's November 7, 2002 letter also requires insurers to submit information relating to the consumer protection provisions of the statute.[9] It requires submission of underwriting guidelines, forms, and general information demonstrating compliance with the statute. The Department supports its argument that it has authority to request the information specified by citing to its general powers to investigate insurance companies. The Commissioner is authorized to make public or private investigations and to conduct investigations and hold hearings for the purpose of compiling information related to his duties.[10] An insurer must also comply with a request for information from the Department within the time specified.[11] The

Commissioner also has free access to all of the records of an insurance company to ascertain its compliance with law.[12] The Commissioner's specific authority to conduct investigations relating to his duties and to request information from insurance companies adequately supports the request set out in its November 7, 2002 letter requiring submission of information about consumer protection practices. The general information sought will allow the Department to examine the procedures put in place by insurance companies in connection with credit scoring.

The Department argues that the guidelines document simply reflects the Department's understanding of what the legislature intended insurers to file to fulfill their obligations under the statute. It argues that the request does not state that the listed information must be filed with the Commissioner nor does it threaten enforcement action if the specific information is not filed. The Department does state in the document however, that the information described will satisfy the requirements of the statute and notes that electing not to submit complete information will prolong the time needed by the Department to complete its review. The format of this information request is not voluntary. The document states that "submission of complete information, clearly articulated, will expedite our determination of whether your filing complies with the new legislation." An insurer would have little choice but to submit the detailed information called for in the Department's directive.

The Department's guidelines are meant to interpret the statutory language at Minn. Stat. § 72A, subd. 36(g). In Minnesota, interpretive rules are required to be adopted through rulemaking under the Administrative Procedures Act.[13] Rules are defined as "every agency statement of general applicability and future effect … adopted to implement or make specific the law enforced or administered by that agency …"[14] The guidelines in question implement the statute and make specific the information called for by the legislature.

The Department also argues that its request for information comports with a common definition of "methodology" as "a body of methods" or "a set of procedures." "Support" is sometimes defined as "to provide with substantiation." But the central question is whether or not the Department's request adds to the statute and creates new requirements beyond that intended by the legislature. The Petitioners argue that the legislature weighed the burdens on the insurance industry when it decided what to require, and that the Department is adding new requirements not authorized by the law. The question is whether the Department's guidelines are more burdensome than the legislature intended.

The statute calls for the insurer's credit scoring methodology and information to support the use of credit scoring as a underwriting criterion. The Department's request is far more detailed. For example, in regard to the scoring methodology, rather than simply asking for a formula and a sample calculation, it goes on to require that variables such as inquiries, be clearly defined and explain the way in which variables are used. It also requires a detailed description of the characteristics of the underlying data. In regard to support for the use of credit scoring as an underwriting criterion, even more detail is asked for including an explanation of the premium and loss data used in the

analysis, an explanation of length of time for which the score is considered valid and actual company premium loss experienced using credit insurance scores.

These requests do not restate or comport with the plain meaning of the statute. Their detailed and burdensome nature are not consistent with the brief statutory requirements. Instead, they go beyond the statute and add to its requirements. This can only be done through legislation or through rulemaking under the Administrative Procedure Act. Accordingly, the Department is ordered to cease enforcement of the November 7, 2002, guidelines directed to insurance companies.

The Department seeks recovery of the costs of the review of this petition by the Office of Administrative Hearings. Under the statute:

> If the administrative law judge rules in favor of the agency, the agency may recover all or a portion of the costs from the petitioner unless the petitioner is entitled to proceed in forma pauperis under section 563.01 or the administrative law judge determines that the petition was brought in good faith and that an assessment of costs would constitute an undue hardship for the petitioner.[15]

The Department has partially prevailed in this proceeding since the information request in its November 7, 2002 letter is determined not to be an unadopted rule. Although the petition was brought in good faith, an assessment of costs against the petitioners will not create an undue hardship. It is therefore ordered that the Petitioners must remit one-half of the amount billed by OAH to the Department.

G.A.B.

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[1] Minn. Stat. § 14.381.
[2] Minn. Stat. § 72A.20, subd. 36.
[3] Minn. Stat. § 72A.20, subd. 36 (g).
[4] The November 7, 2002 documents are attached to this Order as Exhibit A.
[5] *Cable Communications Board v. Nor-west Cable Communications Partnership*, 356 N.W. 2d 658, 667 (Minn. 1984).
[6] *Sellner Manufacturing Co. v. Commissioner of Taxation*, 202 N.W. 2d 886, 888-89 (Minn. 1972).
[7] *Swenson v. State Department of Public Welfare*, 329 N.W. 2d 320, 324 (Minn. 1983).
[8] *Johnson Brothers Wholesale Liquor Co. v. Novak*, 295 N.W. 2d 238, 243 (Minn. 1980).
[9] Minn. Stat. § 72A.20,subd. 36(a)-(f).
[10] Minn. Stat. § 45.027,subd. 1(1) and (4).
[11] Minn. Stat. § 45.027, subd. 1a.
[12] Minn. Stat. § 60A.031, subd. 3.
[13] Minn. Stat. § 14.28,subd. I.
[14] Minn. Stat. § 14.02, subd. 4.
[15] Minn. Stat. § 14.381,subd. 3.